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NOTE AND COMMENT

CARRIERS—SECOND CUMMINS AMENDMENT.—It was seven years after the Carmack Amendment of the Hepburn Act of 1906 before the Supreme Court began that series of decisions, extending from *Adams Express Co.* v. *Croninger*, 226 U. S. 491 (1913), to *George N. Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278 (1915), which directly resulted in the First Cummins Amendment of March, 1915. One has only to read those cases, reviewed in 13 MICH. L. REV. 590, and other notes referred to in 17 MICH. L. REV. 183, to see that the language of the Cummins Amendment was framed expressly to undo the interpretations of the court on the Carmack Amendment, and make the liability of the carrier just what during the years 1906-1912 it had generally been understood the Carmack Amendment intended it to be. Indeed, from the decision of *New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. (U. S.) 344 (1848), to the present day there has been a contest between the courts and legislatures as to what should be the law of liability of common carriers, the courts through one device or another opening a way of escape for the carrier from the strict common law liability, and the legislatures, state and federal, passing statute after statute to bring the law back to its pristine simplicity and strictness.

Just what induced the passage, within little more than a year after the act of March, 1915, of the so-called Second Cummins Amendment of August, 1916, is not entirely clear, nor have we yet decisions enough to enable us to know where this last act leaves the law of liability. It is fairly clear that this act was due to a feeling that the First Cummins Amendment had gone too far in that it had made the carrier liable for the full value of the goods lost or injured, and according to the common law rule as to damages and not to any agreement or so-called agreement of the shipper, *Matter of Bills of Lading,* 52 I. C. C. 671, 709, but without giving the carriers any compensation for added liability due to the increased value of the goods, *McCaull-Dinsmore Co.* v. *C., M. & St. P. Ry. Co.,* 252 Fed. 664, affirmed 260 Fed. 835, 253 U. S. 97. There never had been any tariff of rates based on cost of insurance, and this act seemed to forbid making one. The shipper of goods valued at five dollars paid the same rate as a shipper of a like quantity of goods in the same classification whose value might be $100 or $1,000. In every case the liability for loss was the actual value of the goods. *McCormick* v. *Southern Express Co.,* 81 W. Va. 87 (1917), allowing recovery of $300 for loss of a dark Cornish cock shipped in an open crate, at the rate charged for ordinary chickens; *C., M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.,* 253 U. S. 97 (1920); see 20 MICH. L. REV. 348, 18 *ib.* 791, an authoritative decision on that point. In view of this, *Springfield L., H. & P. Co.* v. *N. & W. Ry. Co.,* 260 Fed. 254; *Bowman-Kranz Lumber Co.* v. *Bush,* 104 Neb. 165 (1920), and such cases, holding good stipulations that recovery shall be limited to *bona fide* invoice price, if any, or to value at time and place of shipment, cannot stand under the First Cummins Act. Some cases, like *Wallingford* v. *A., T. & S. F. Ry. Co.,* 101 Kan. 544, may involve shipments before June, 1915, and so fall under the Carmack Amendment, but that is not true certainly of *Caston* v. *M., K. & T. Ry. Co.,* 105 Kan. 487, where the facts show an interstate shipment on March 2, 1916. The decision here, however, is placed on the fact that recovery was allowed in excess of amount claimed. The Kansas court allows full actual value for two trunks lost, contents hidden from view and value neither asked nor given, in *Payne* v. *Adams Express Co.* (Kan. 1921), 195 Pac. 860, a shipment made August, 1915, and therefore falling under the First Cummins Act. To the same effect is *Thompson* v. *G. N. Ry. Co.* (Id. 1918), 174 Pac. 607. The decision of the Supreme Court in the *McCaull-Dinsmore* case, supra, is decisive as to all cases under the First Cummins Act.

The Second Cummins Act eliminated a provision of the first act specially applying to goods hidden from view, see 17 MICH. L. REV. 183, noting *Thompson* v. *Gt. Northern Ry. Co., supra; Tribble* v. *So. Express Co.,* 111 S. C. 31, and substituted a long proviso clearly excluding baggage from the operation of the act, and therefore as to baggage reinstating *B. & M. R. Co.* v. *Hooker,* 233 U. S. 97. The proviso also leaves under the Cummins Act ordinary live stock. As such live stock is usually carried by weight, and also sold by weight, it is evident that, through weight, value and rate are reasonably connected in most cases, and the law is equitable. The same

thing may be said of other commodities in which weight is the unit of value in sale and of charge for freight. But the Second Cummins Amendment as to all other goods except baggage and live stock has a provision which has been said to have "apparently restored to a large extent the operation of the Carmack Amendment as it had been judicially construed." 10 C. J. 138. Whether this is correct will be in doubt till an authoritative decision by the United States Supreme Court, but a careful reading of the language does not seem to show that such was the intent. That could have been brought about by re-enacting the Carmack Amendment except as to ordinary live stock.

What Congress apparently did do was to provide that the rates of the Carmack Amendment should apply to cases in which there is *express authorization,* by order of the Interstate Commerce Commission, to establish and maintain rates dependent on value *declared in writing* by the shipper *or agreed upon* in writing as the released value of the property. This authorization the commission is empowered to make "where rates dependent upon and varying with declared or agreed values would, *in its opinion, be just and reasonable* under the circumstances surrounding the transportation." The words italicised indicate the more significant requirements that seem to show *George N. Pierce Co.* v. *Wells, Fargo & Co., supra,* is not to come back, or, if so, that the shipper is to be safeguarded. To what extent and how the Commission and the courts will provide for this cannot be fully known till there are more decisions than have yet been rendered, but there are some indications.

The Commission has several times considered the Second Cummins Act. *In the matter of Express Rates,* 43 I. C. C. 510, it was held that the act invalidated all limitations, or attempted limitations, of liability in case of ordinary live stock, "wherever or in whatever form it is found." See further, on live stock rates, *Live Stock Classification,* 47 I. C. C. 335. In *Williams* v. *Hartford & N. Y. Transportation Co.,* 48 I. C. C. 269, rates on soap published without the authority of the Commission were declared unlawful. It was suggested that rates properly revised might receive attention within a reasonable time. What will be the basis for rates according to value that will be approved by the Commission is not yet fully apparent. The guiding principle should be the remarkably clear and accurate opinion of Commissioner Lane in *Matter of Released Rates,* 13 I. C. C. 565, 9 MICH. L. REV. 236, to the effect that "a certain differential between rates which leave the carrier's liability unlimited and rates which provide for a limited liability is obviously proper, but the differential should exactly measure the additional insurance risk which the carrier assumes when the liability is unlimited." The cases do not reveal that any tariff based on cost of insurance has ever been scientifically worked out or attempted. Instead, we find such provisions as an increased charge of twenty per cent for insurance, or of added cost for higher valuations at so much for each hundred pounds. Household goods are not properly valued by the hundred weight. Cf. *Ostroot* v. *N. P. Ry. Co.,* 111 Minn. 504, with *Larsen* v. *O. S. L. R. Co.,* 38

Utah 130. The Second Cummins Act puts control of this in the Interstate Commerce Commission. A recent ruling on cost of transmission of "valued messages" by telegraph companies approves an addition to the repeated rate of one-tenth of one per cent of the stated values in excess of $5,000. *Limitations of Liability in Transmitting Telegrams,* 61 I. C. C. 541 (March, 1921). This is in the direction of a charge proportioned to the liability, though far from a complete scientific table of insurance rates. Nothing could be much more unscientific than the former practice of telegraph companies to charge double, or one and a half price, for repeated, full liability messages, and then settle in full with those who pushed claims, leaving others to the recovery provided for on the telegraph blanks. See discussion in the above case. That notice of rates based on liability should not be merely in filed tariffs, but rather in bills of lading signed by the shipper and containing provisions limiting liability, is insisted upon in *Perishable Freight Investigation,* 56 I. C. C. 449, 481. The most extensive and illuminating discussion by the Commission is to be found in *Matter of Bills of Lading,* 52 I. C. C. 671, 708, 740.

A so-called "Uniform Bill of Lading" had been *approved* by the Commission as early as 1908, and, with some later modifications, had been in general use in a large part of the United States. Acting under the Second Cummins Act, the Commission now *orders* the adoption of a new Uniform Bill of Lading, Appendix B of the report, containing this stipulation as to amount of liability: "If the property covered by this bill of lading is hidden from view and the shippper has specifically stated in this bill of lading the value of the property, no carrier shall be liable beyond the amount so specifically stated, whether or not the loss or damage occurs from negligence: *Provided,* in all cases not prohibited by law, that where a lower value than actual value has been represented in writing by the shipper, or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence." Decided April 14, 1919.

This note will close with a reference to the few significant decisions already made by the courts. In *Western Assurance Co.* v. *Wells, Fargo & Co.* (Minn., 1919), 173 N. W. 402, the court held the express company to liability for the full value, $1,547.99, of three fur coats, value not marked on the box nor stated to the agent, because it was not shown the company had obtained by order of the Commission the right to adopt alternative rates based on declared or stated values. *Buschow Lumber Co.* v. *Hines* (Mo., 1921), 229 S. W. 451, although involving a shipment under the Second Cummins Act, follows *C., M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.,* 253 U. S. 97, which was decided under the First Cummins Act, and does not note that the Second Act changes the law of liability of the First. In *Wells, Fargo & Co.* v. *Bollin* (Tex. Civ. App., 1919), 212 S. W. 283, the court finds full value recoverable upon a shipment March 3, 1917, no receipt being issued till several weeks after, and that *never signed by the shipper.* But upon a

rehearing, and on authority of cases decided under the Carmack Amendment, the judgment was reformed to limit recovery to the amounts stated in the receipt, and presumably in the filed tariffs of the company. The requirement of the Second Cummins Act that the value be "declared in writing by the shipper, or agreed upon in writing as the released value of the property," is entirely overlooked, and, so far as appears, also the further provision that such limitation must have been "expressly authorized or required by order of the Interstate Commerce Commission." If this decision be followed, then indeed the statement in 10 C. J. 138 is correct, that the operation of the Carmack Amendment has been to a large extent restored, and the two Cummins Amendments, except in case of ordinary live stock, judicially overruled. The language of the statutes is not as clear and definite as might have been desired. But certainly there is a wide difference between a liability limited to a lower rate "unless the shipper declares a value greater," upheld in the *Bollin* case, and a "value agreed upon in writing" of the act.

The case of *Poliakoff* v. *Am. Ry. Express Co.* (S. C., 1921), 105 S. E. 744, differed from the *Bollin* case in that the receipt with provision for limited liability unless a greater value was declared was issued at the time of the shipment and was signed by the shipper. Verdict and judgment for full value on the ground that the shipper did not know or assent to limited liability, value being neither asked nor given, was reversed on the ground that the case was governed by federal decisions, and *American Express Co.* v. *U. S. Horseshoe Co.*, 244 U. S. 58, was decisive. But that case was under the Carmack Amendment and could not be decisive here, unless it be that the Carmack Amendment has indeed been restored. That such is not the case, and that decisions under the Carmack Amendment are not controlling now, is held and clearly explained in *Lindenburg* v. *Am. Railway Express Co.* (W. Va., 1921), 106 S. E. 884. The statute requires the declaration or agreement as to value to be made in writing, or rather does not authorize carriage under limited liability, nor the Commission to provide for it, except upon a written declaration or agreement as to value. * * * Preparation and promulgation of regulations by the Interstate Commerce Commission, and the posting of tariffs by the carrier conforming to such regulations, do not alone limit the liability in any particular case." Strangely enough, this case refers to *American Express Co.* v. *U. S. Horseshoe Co., supra,* as decided "under the present law," and seeks to distinguish it. If it were under the present law it would settle the question of values limited in filed tariffs in favor of the carriers' contentions and in an extreme form, for not only was there no value asked or given, but it seems the tariffs were on file only with the Commission in Washington, and not in the local office of the company. But the shipment was under the Carmack Amendment. The date does not appear, but the case was first tried in 1914, and was before the Pennsylvania Supreme Court in 1915 (see 250 Pa. 527), so that the shipment was before either Cummins Act had been passed.

The best considered case to date is *American Railway Express Co.* v. *Galt* (Miss., Feb. 1922), 90 So. 597, holding that even if the classification

and tariffs be treated as authorized by the Commission, and the low rate based on a $50 valuation has been paid, yet full actual value is to be recovered where the blank space in the receipt for declaration of value has not been filled in. After quoting from the *Lindenberg* case, *supra,* the court says: "It appears from the statute that it was the purpose of Congress to afford the shipper full value for his loss, unless he chose to take the initiative in the manner laid down by the statute,—that is, by declaring a released value in writing. It is left entirely optional with the shipper; the carrier has nothing to do with the matter, other than to accept the shipper's declaration of released value in writing. The purpose of the statute is to give the shipper the active conscious choosing whether he will pay the lower rate and recover less than full value in case of loss or damage. If he so chooses he sets down in writing in the receipt the released value. On the other hand, if he is silent, either from choice or ignorance, he pays the higher rate, which carries with it the right to recover full compensation for his loss." A clearer statement of what the face of the act seems to show Congress intended could hardly be made.

The courts by construction emasculated the provisions of the Carmack Amendment as to liability of the carriers. The direct result was the two Cummins Amendments. It is to be hoped the former course will not be repeated, but that the straightforward, clear construction of the West Virginia and Mississippi cases will be approved. If so, then the shipper can reasonably demand but one thing more, viz., that the Commission will approve no rates unless they are based on a fair, properly graded charge for insurance. It should be no more difficult to make an accurate table of insurance rates for carriers than for insurance companies, and it is time it was done Then if the shipper desires insurance, let him pay for it, at reasonable rates and after written declaration by him, not by the carrier or by force of rules or tariffs of which he has no actual knowledge. If the courts and the Commission give effect to the present law along these lines it is believed the huge volume of expensive litigation about amount of recovery will shrink to almost nothing, and further statutes will be unnecessary. Nearly all the litigation on this question that comes to courts of last resort is a protest against the injustice of the Carmack Amendment as judicially amended in *Adams Express Co.* v. *Croninger,* 226 U. S. 491, down to *Geo. N. Pierce Co.* v. *Wells, Fargo & Co.,* 236 U. S. 278. The amendment was intended by Congress as a benefit to the shipper, but as interpreted by the courts it left him much worse off than he was before on this matter of the amount of his recovery The fight between the legislatures and the courts has been profitable to the attorneys, but it has been expensive to the carrier, to the shipper and to the public, all of whom have been heavily drawn upon to pay the bills. If the carrier charges for what it furnishes, for insurance as well as for carriage; if the shipper pays a reasonable price for what he gets, by way of insurance as well as by way of carriage, if the public is relieved of added expense to maintain courts and court costs in a matter that in most cases should be readily settled out of court, it is possible attor-

neys may find other ways to earn their living, all to the very great advantage of the country. The victories of the carriers in court have been Pyrrhic victories, and their cost might far better have been used to pay shippers in full for losses suffered by the fault of the carrier. It is no hardship to require the carrier to pay insurance losses if he is allowed to charge proper prices for such insurance. His prices in the past have not been proper. The shipper has no case if, being offered insurance at proper prices, he consciously chooses to ship at his own risk. He has felt aggrieved, and will continue to do so if he is overcharged for insurance, or if he is not informed of the choice that is offered to him. The Second Cummins Act reasonably interpreted offers a sane and peaceful solution. E. C. G.

IMMUNITY OF STATE SHIPS ENGAGED IN COMMERCE.—The subject of the immunity which foreign sovereign states and the property of such states shall enjoy in our courts has always given judges a great deal of trouble. Although confronted with an almost hopeless confusion of opinion found in treatises on international law and decided cases, Judge Mack, in a recent case, *The Pesaro* (D. C., S. D., N. Y., Oct. 1, 1921, Supp. Op., Dec. 13, 1921), 277 Fed. 473, has probably made a creditable contribution to the solution of some of the difficulties. The steamship *Pesaro* was owned by the kingdom of Italy and manned by civilian officers and crew under the direction of the ministry for railway and maritime transportation. She was engaged in ordinary commercial trade carrying passengers and goods for hire, the vessel being in no way connected with the Italian navy. This action was a libel *in rem* against the ship to enforce a claim for damages to a cargo of olive oil shipped thereon. The case had already been to the Supreme Court (*The Pesaro,* 255 U. S. 216), where it was ruled that the Italian ambassador's direct suggestion that the ship was owned by the Italian government must be made through diplomatic channels of our government. Only one question remained for the district court to decide, and it was held that an ordinary merchant vessel owned, operated and in the possession of a foreign sovereign state and engaged in carrying passengers and cargo for hire is not immune from arrest on process from the admiralty courts of the United States, especially in view of the fact that a vessel of the United States in like circumstances would not be immune in the courts of that foreign state.

The leading English case dealing with this problem is *The Parlement Belge* (1880), 5 P. D. 197. The suit was *in rem* against an unarmed mail packet owned by Belgium and officered by officers of the royal Belgian navy, to recover for damages caused by collision. Besides carrying mail, the ship carried merchandise and passengers for hire. That a foreign sovereign could not be directly impleaded, in either private or official capacity, would seem clear. See *Mighell* v. *Sultan of Johore* [1894], 1 Q. B. 149; *Duke of Brunswick* v. *King of Hanover,* 6 Beav. 1; 2 H. L. 1. In the *Parlement*